IN THE COURT OF COMMON PLEAS OF [illegible] COUNTY

CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA : AUGUST TERM, 1977

vs. :

[illegible] DORSEY : NO. 1207

O P I N I O N

Cleary, J., et al.

The defendant [illegible] was brought to trial before a jury, on charges of rape, involuntary deviate sexual intercourse, aggravated assault. The jury returned a verdict of not guilty on the rape charge but guilty of the lesser offenses. Timely filed post-verdict motions, which both argued and denied. Thereafter, the defendant [illegible] and now, [illegible], this [illegible] to judgment. Defendant [illegible] appeal.

[illegible]

EXHIBIT "A"

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[illegible] was filed on July 18, 1980, but not received until September [illegible], upon return from summer vacation. The Statement, containing nineteen [illegible] paragraphs, many are redundant and have been considered by the Court for the purpose of this decision.

Defendant first complains that the Court erred in denying his Motion to Suppress Physical Evidence. He argues that probable cause for the search warrant to seize Defendant's underwear was acquired as a result of Defendant's unlawful arrest. He contends that Defendant's arrest was unlawful in that [illegible] Defendant have probable cause to arrest [illegible] Defendant [illegible] Fla. Stat. [illegible] 901.15, 901.151 [illegible] Fla. [illegible] 10, 1977, [illegible] 347, [illegible] 53, [illegible] 2d [illegible] 2, 12, 17; [illegible] 2d [illegible] 2, [illegible] 2d [illegible] 2, [illegible] 2d [illegible] 2,

evidence established that Officer Anthony [illegible], while patrolling in a radio patrol car, at midnight on August 21, 1970, received a radio message to meet complainant with a complaint of possible rape, at 15th and York Streets. As the officer approached this intersection, he saw complainant emerging from a telephone booth crying and in an agitated state. She informed the officer that she had just been raped inside 2412 Dancroft Street by her stepfather. Officer Magdalinski radioed for assistance and with complainant proceeded to 2412 Dancroft Street, while [illegible] three streets [illegible] of 15th on York St[illegible]. [illegible] the officer that she resided at this residence with her two children, along with her mother and [illegible]. Upon arrival at the premises, the officer found the [illegible] and complainant explained what had taken place. Both the [illegible] and complainant [illegible] her legs. Both the officer and complainant [illegible] [illegible] [illegible]

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J. 677/81

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
	:	No. 1564 Philadelphia, 1980
WILLIAM BERRY, Appellant.	:	

J U D G M E N T

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of PHILADELPHIA County be, and the same is hereby AFFIRMED.

BY THE COURT:

J. Haniel Henry
PROTHONOTARY

Dated: November 30, 1981

EXHIBIT "B"

J. 677/81

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
	:	No. 1564 Philadelphia, 1980
WILLIAM BERRY, Appellant.	:	

Appeal from the Judgment of Sentence of the Court of Common Pleas, Criminal Division, Philadelphia County, at Nos. 1306 and 1307 August Term, 1979.

Before: CERCONE, P.J., HESTER, AND JOHNSON, JJ.

PER CURIAM:

The judgment of sentence of the lower court is affirmed.

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
WILLIAM BERRY, Appellant.	:	No. 1564 Philadelphia, 1980

Appeal from the Judgment of Sentence of the Court of Common Pleas, Criminal Division, Philadelphia County, at Nos. 1306 and 1307 August Term, 1979.

Before: CERCONE, P.J., HESTER, and JOHNSON, JJ.

MEMORANDUM OPINION:

Appellant, William Berry, takes this appeal from his conviction for indecent assault.[1] Appellant argues for two reasons that the trial court's rulings denied him due process, the right to confront witnesses against him, and the right to present a defense. We find appellant's arguments to lack merit and we affirm.

The victim of this alleged attack was Deborah Young, appellant's twenty-five year old step-daughter. Miss Young testified that on August 10, 1979, she and her two children were living in the same house with her mother and step-father; also living in the house were the complainant's sister and the sister's children. According to Miss Young, on the date in question she returned home at approximately 11:30 p.m. and went directly to bed. Miss Young's five-year-old daughter shared her bed, and her seven-year-old son slept in a separate bed in the

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[1]Appellant was acquitted of the charge of rape.

same room. At about 12:15 a.m. that same evening (now August 11, 1979), the complainant awoke to find her step-father in the process of performing an act of intercourse with her. Miss Young pushed him away and asked him what he was doing in her room, whereupon appellant told her to be quiet, put on his undershorts, and left her room. Her children remained sleeping during the incident and, immediately after appellant left her room, the complainant prompty put on some clothes and went outside to a pay phone to call the police, since there was no phone in the house.

The police responded within a few minutes and upon entering the house, they found appellant, apparently asleep, in bed with his wife, the victim's mother. At the time of his arrest, appellant was wearing a tee-shirt and boxer-type undershorts. Miss Young told the police that those were the same undershorts worn by appellant during the incident. Tests later performed on the undershorts indicated the presence of seminal stains and spermatozoa. The complainant was taken to the hospital shortly after the incident and an examination showed the presence of prostatic seminal fluid, though no spermatozoa, in her genital region.[2] Appellant denied that the incident took place and

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[2]The expert witness called by the prosecution testified that the absence of spermatozoa could be explained in two ways. The expert stated that spermatozoa can be released at any time during ejaculation. The witness also indicated that the absence of sperm could mean that the man was sterile.

claims that the stain on his undershorts was a result of having had sexual intercourse with his wife the night before.

At trial, William E. Jackson, a microbiologist, testified for the Commonwealth. It was Mr. Jackson who analyzed the specimens taken from the genital region of the victim and who also performed the tests on the undershorts taken from appellant. Mr. Jackson testified that prostatic seminal fluid is produced only by males. Mr. Jackson further testified that this seminal fluid doesn't "last in a female for more than 48 hours." In view of this last statement by Mr. Jackson, defense counsel later endeavored to ask the complainant if she had had sexual intercourse with another man in the twenty-four hour period preceding the alleged rape. This line of questioning was objected to by the Commonwealth and the objection was sustained by the court, citing 18 Pa.C.S. §3104(a) (Supp. 1981). This section of the law reads:

> Evidence of specific instances of the alleged victim's past sexual conduct, opinion evidence of the alleged victim's past sexual conduct, and reputation evidence of the alleged victim's past sexual conduct shall not be admissible in prosecutions under this chapter except evidence of the alleged victim's past sexual conduct with the defendant where consent of the alleged victim is at issue and such evidence is otherwise admissible pursuant to the rules of evidence.

18 Pa.C.S. §3104(a).

Appellant challenges the trial court's ruling in this matter, arguing that since consent was not an issue in the

instant case and in view of Mr. Jackson's testimony in which he said that seminal fluid "lasts" up to forty-eight hours in the vagina, appellant should be permitted to ask the complainant if she had had intercourse with another in the twenty-four hours preceeding the said incident. We disagree. The intent behind section 3104 was to protect a witness from attacks designed merely to harass and humiliate. Commonwealth v. Strube, ___ Pa. Superior Ct. ___, ___, 418 A.2d 365, 369 (1979). Prior to the passage of section 3104, a complainant in a rape case could be questioned at length regarding her prior sexual contacts and witnesses could be called by the defense to impugn the victim's chastity, all under the theory that "a female who had been in the recent habit of illicit intercourse with others will not be so likely to resist as one who is spotless and pure." Lee v. State, 132 Tenn. 655, 658, 179 S.W. 145, 145 (1915). The fear was that a woman who in reality had consented to premarital, sexual relations might later regret her decision and "cry rape" at a subsequent date. As this Court previously noted, "[t]he rape shield laws are legislative recognitions of the minimal probative value of sexual history and are designed to prohibit, to varying degrees, the travesty of presenting a noisome stream of defense witnesses testifying to the sexual propensities, often sordid and sometimes fanciful, of the complaining witness." Commonwealth v. Strube, ___ Pa. Superior Ct. at ____, 418 A.2d at 369.

In Commonwealth v. Duncan, ___ Pa. Superior Ct. ___, 421 A.2d 257 (1980), this Court was asked to delineate the scope of the exclusionary prohibition set forth in section 3104. The defendant in Duncan wished to use evidence of the victim's past sexual conduct to show bias on the part of that witness. This evidence was not allowed and the defendant appealed. We affirmed, saying:

> [I]n enacting 18 Pa.C.S.A. §3104 the legislature has determined that evidence of past sexual conduct by the victim with third persons is not admissible for any purpose. The statute does not state that the evidence is admissible except for the purpose of showing the victim's reputation. Rather it generally prohibits the admission of such evidence for any purpose except in the sole instance where consent is at issue and the evidence relates to conduct of the victim with the defendant. Where, as here, the words of the s atute are clear, the letter thereof will not be disregarded under the pretext of pursuing an unstated legislative intent."

Id. at ____, 421 A.2d 258. (citations omitted) (emphasis in original). In view of our holding in Duncan, we find appellant's argument to lack merit.

Appellant also contends that the trial court committed reversible error when the court refused to allow appellant to call his wife to the stand to testify that she and appellant had had sexual intercourse the previous night and that on that night appellant was wearing the same undershorts that he had on when he was arrested. We do not find this to be a reason to reverse because we do not find that appellant was harmed by this ruling. The jury acquitted appellant of the charge of rape, although it

convicted him of indecent assault. This means that while the jury believed that appellant may have lain on top of his victim, it did not find that appellant actually penetrated the victim's vagina with his penis. Therefore, in view of the verdict returned by the jury, it is apparent that the presence of seminal stains on appellant's undershorts was of no moment, since sexual intercourse is a necessary element for the charge of rape. Accordingly, appellant did not need to prove that the seminal stains on appellant's shorts were a result of sexual intercourse with his wife, rather than from raping his step-daughter, since the jury did not find that appellant raped his step-daughter. For this reason, we find that the argument advanced by appellant is not cause to reverse.

Affirmed.

Supreme Court of Pennsylvania

Marlene Lachman Esq.
PROTHONOTARY

Eastern District

468 CITY HALL
PHILADELPHIA 19107
(215) 496-4600

September 2, 1982

John W. Packel, Esq.
Chief, Appeals
DEFENDER ASSOCIATION
121 N. Broad Street
Philadelphia, Pa. 19107

RE: Commonwealth of Pennsylvania
v. William Berry, Petitioner
No. 680 E. D. Misc. Dkt. 1981

Dear Mr. Packel:

This is to advise you that on August 30, 1982 the Supreme Court entered its Order denying the Petition for Allowance of Appeal in the above-captioned matter.

Very truly yours,

Marlene Lachman, Esq.
Prothonotary

ML:jap
cc: Robert Lawler, Esq.

EXHIBIT "C"

RECEIVED
[illegible] 25 1982
SUPREME COURT
EASTERN DISTRICT

DEFENDER ASSOCIATION OF PHILADELPHIA
BY: Benjamin Lerner, Defender, and
LEONARD SOSNOV, Assistant Defender
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Attorney for WILLIAM BERRY

WILLIAM BERRY, Appellant	IN THE SUPREME COURT OF PENNSYLVANIA - EASTERN DISTRICT
VS.	NO. 680 E.D.
COMMONWEALTH OF PENNSYLVANIA	MISC. DKT. 1981

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that William Berry, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Pennsylvania, entered on August 30, 1982 in Commonwealth of Pennsylvania v. Berry, denying appellant's petition for allowance of appeal from the Superior Court of Pennsylvania's affirmance of appellant's judgment of conviction and sentence.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Counsel For Appellant

EXHIBIT "D"

COPY
Original Filed in Superior Court
OCT 2[illegible] 1982
Phila District

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Attorney for WILLIAM BERRY

WILLIAM BERRY, Appellant	IN THE PENNSYLVANIA SUPERIOR COURT
VS.	NO. 1564
COMMONWEALTH OF PENNSYLVANIA	PHILADELPHIA, 1980

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that William Berry, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Pennsylvania, entered on August 30, 1982 in Commonwealth of Pennsylvania v. Berry, denying appellant's petition for allowance of appeal from the Superior Court of Pennsylvania's affirmance of appellant's judgment of conviction and sentence.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Counsel For Appellant

EXHIBIT "E"

RECEIVED

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QUARTER SESSIONS

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WILLIAM BERRY, Appellant	IN THE COURT OF COMMON PLEAS CRIMINAL TRIAL DIVISION
VS.	AUGUST SESSION, 1979
COMMONWEALTH OF PENNSYLVANIA	NO. 1307

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This appeal is taken pursuant to 28 U.S.C. §1257(2).

Counsel For Appellant

EXHIBIT "F"